

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act)	CC Docket No. 96-98
of 1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

Initial Comments of LecStar Telecom, Inc.

LecStar Telecom, Inc. (“LecStar”) respectfully submits its comments in the above-captioned proceeding in response to the Federal Communications Commission’s Further Notice of Proposed Rulemaking adopted on February 20, 2003 and released on August 21, 2003¹ regarding proposed modifications to its existing rules that implement section 252(i) which requires local exchange carriers (LECs) to make available to other telecommunications carriers interconnection agreements approved under section 252. This requirement is frequently referred to as “pick and choose.”

¹*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 98-147 and 01-338 (*Triennial Review Order and FNPRM*) (rel. August 21, 2003).

Background

LecStar is a small Competitive Local Exchange Carrier based in Atlanta, Georgia serving residential and commercial customers in 9 Southeastern States: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. LecStar utilizes a combination of the UNE-P and Resale platforms to deliver voice services to its customers.

LecStar is a privately held company that is dwarfed in size by our counter party in negotiations: BellSouth Telecommunications, Inc. (“BellSouth”). While our company does not possess the resources required to participate fully in the Federal regulatory process, this proceeding is important enough to our organization, other smaller CLECs and, ultimately, the public interest through providing diversity of choice of telecommunications carriers, that we are compelled to offer a few brief comments in this proceeding.

LecStar Telecom, Inc. negotiation experience

LecStar actively re-negotiated with BellSouth over approximately 7 months and ultimately opted into an existing Interconnection Agreement with changes using pick and choose rules dating from adoption of section 252(i) of the *Local Competition Order (61 FR 52706 October 8, 1996)*. LecStar signed the interconnection agreement on November 22, 2003 and BellSouth signed the agreement on December 2, 2003 with an effective date of January 1, 2003. LecStar sought 27 modifications to the agreement in the negotiations and utilized pick and choose provisions from 2 different interconnection agreements to

address 2 of these requirements. The majority of the requested 27 modifications, however, were unmet during these unevenly matched “negotiations.” As we will discuss more fully later in these comments, arbitration is not a realistic option for most small CLECs due to the substantial resources required to seek assistance from an arbitrator. As a result, LecStar had no choice but to close the open items where negotiations had failed to establish common ground. The negotiations would have been *completely* unsatisfactory if pick and choose rules had not been available to LecStar to assist in our negotiations.

LecStar Telecom, Inc. concerns

LecStar is concerned that this NPRM is based on a flawed premise. The Commission appears to assume that ILECs are somehow being taken advantage of by widespread pick and choose contracting abuses, or conversely, that the CLECs will suddenly receive better treatment and numerous concessions in closed door give and take negotiations with incumbent LECs many times their size since those concessions are no longer subject to pick and choose obligations. LecStar believes that pick and choose rules are not being abused, and challenges the ILECs to present evidence of widespread “cherry-picking” of a contract concession without the corresponding contractual quid pro quo. The concern at the heart of this NPRM is general in nature with no specific examples or associated impacts clearly defined. Instead, much is promised but little will be yielded from vague assurances that “innovative deal making” will suddenly become the hallmark of ILEC Interconnection Agreement negotiations if pick and choose rules requirements are eliminated or substantially weakened.

LecStar contends that the problem with pick and choose is not the rules, but rather, the *implementation* of the rules by the ILECs. The ILECs have not negotiated agreements with the necessary flexibility built into the clauses to permit adoption of their terms and conditions. This is a case of developing regulatory remedies for the ILECs' business shortcomings and is not worthy of the Commission resources being utilized in this docket.

LecStar does not understand what concessions could be made by the ILEC that are not currently available today and why those concessions cannot have any associated "trade-offs" referenced or otherwise required of an adopting carrier in the clause. This NPRM will disadvantage and ultimately stamp out small competitors by raising another barrier to entry for new competitive telecommunications carriers.

Small CLECs pose no real threat of arbitration

As evidenced in our negotiations with BellSouth, LecStar and other small CLECs cannot realistically threaten to go to arbitration due to the substantial cost relative to the small organization's resources. As a result, the ILEC counter party can just stop negotiating; reject the small CLEC's proposed terms without concern regarding arbitration. Larger CLECs that can afford to arbitrate their agreements are able to negotiate as equals and to receive fair and reasonable agreements, putting those organizations with greater resources in a position of competitive advantage.

While small CLECs *could* pursue arbitration, the estimated legal costs of \$100,000 per jurisdiction (if the proceeding is relatively straightforward, and many times that amount if substantial resistance is put forward by the ILEC) would result in a Pyrrhic victory: destroying the company to arbitrate a fair agreement. Since this is neither realistic, nor desirable, the elimination, or substantial weakening of pick and choose rules, relegates LecStar, and other similarly situated CLECs, to a Standard Agreement. LecStar and other similarly situated CLECs must be provided with equal treatment and parity that is offered to larger businesses by retaining the existing pick and choose rules without modification.

All or Nothing Adoption

The proposal to require adoption of an interconnection agreement in its entirety represented by MPower's recently withdrawn Petition for Forbearance and Rulemaking ("Mpower Petition") in CC Docket 01-117 fails to address the need for agreements to be tailored to the needs of the competitive telecommunications carrier. Frequently, the agreements of the larger CLECs include specific requirements that can only be fulfilled by that CLEC, essentially serving as a "poison pill". Rather than requiring "all or nothing" adoption, existing rules that permit the tailoring of agreements with clauses from multiple agreements and individual clause negotiations with the ILEC permit more acceptable end results without compromising the ILEC's negotiating position.

For example, LecStar sought to address repeated problems with improper win-back communications to our customers by ILEC representatives in situations where ILEC

personnel interact with a LecStar customer as a vendor such as repair calls. The CLEC agreement LecStar proposed to adopt did not have language that protected the company against that particular behavior; however LecStar was able to find acceptable language in another agreement that addressed this concern. A remedy such as this would not have been available to LecStar without pick and choose rules, and yet the solution did not disadvantage the ILEC. Instead the effective use of pick and choose rules clarified the relationship between the companies to prevent future problems with inappropriate customer contacts.

Recommendation

LecStar urges the ILECs to use more effective business practices in complying with section 252(i) of the Local Competition Order so as not to disadvantage themselves with 90% local market share and \$30+ billion annual revenue. We urge the Commission to retain pick and choose rules as reaffirmed by the Supreme Court, as the “most readily apparent” reading of the statute² in order to protect the negotiating position of smaller CLECs and, ultimately, to ensure the survival of competitive telecommunications markets with diversity of providers, including smaller regional providers like LecStar.

Respectfully submitted,

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² Iowa Utils. Bd., 525 U.S. at 396